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Department of the Treasury

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Person to Contact:

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Refer Reply To:
CC:DOM:IT&A PLR-107101-99
Date: DEC 16 1999

Taxpayer:

Taxpayer's EIN:

Taxpayer's Address:

Legend:

X	=
A	=
B	=
Lender	=
City	=
State	=
State Act	=
State Statute	=
Agreement 1	=
Agreement 2	=
q	=
r	=
s	=
t	=
u	=
Proposal	=
m	=
n	=
Year 1	=
Year 2	=
Year 3	=
Year 4	=
Year 5	=

Year 6	=
Year 7	=
Year 8	=
Year 9	=
Year 10	=
Year 11	=
Year 12	=

Dear

This responds to Taxpayer's request for a private letter ruling dated April 8, 1999. Specifically, Taxpayer has requested a ruling that the termination of Taxpayer's power purchase agreement ("PPA") pursuant to the Agreement 2 constitutes a "compulsory or involuntary conversion" of its PPA and its facility within the meaning of §§ 1033 and 1231 of the Internal Revenue Code ("Code"). Taxpayer has also requested a ruling that the amount of any gain (or loss) required to be recognized by Taxpayer in connection with the conversion of its PPA and its facility is a § 1231 gain or § 1231 loss. Taxpayer also requests rulings that the amounts paid to terminate certain agreements relating to its facility are deductible under §§ 162 , 163 or 164 in the year paid.

CONCLUSIONS

(1) The termination of the PPA pursuant to the Agreement 2 constitutes a "compulsory or involuntary conversion" of the PPA and the facility within the meaning of §§ 1033 and 1231.

(2) The amount of any gain (or loss) required to be recognized by Taxpayer in connection with the conversion of its PPA and its facility will be treated as a "§ 1231 gain" or "§ 1231 loss" in accordance with the provisions of § 1231.

(3) The amount paid by Taxpayer to terminate the operation and maintenance agreement that was necessary for the operation of its facility is deductible under § 162.

(4) The amount paid by Taxpayer to terminate its PILOT agreement is deductible under § 164(a)(1).

(5) Taxpayer's termination payments that are deductible under §§ 162 and 164 are deductible in the taxable year in which the termination payments were paid.

(6) Taxpayer may deduct under § 163 in the year of payment amounts paid as penalties for prepayment of the financing agreements discussed below.

FACTS

X is a regulated public utility furnishing electricity to various parts of State. Taxpayer is an independent power producer ("IPP") that was organized in Year 1 for purposes of developing, financing, constructing, and operating a q megawatt hydroelectric facility ("facility") at City in State. The facility is owned by Taxpayer and is located on land leased from X under a long-term lease agreement. The facility was placed in service in Year 3 and is certified as a Qualifying Facility ("QF") under the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 824a, as amended ("PURPA"), and the implementing FERC regulations (18 C.F.R. § 292.207).

PURPA requires electric utilities to purchase electricity from, and enter into legally enforceable obligations with, QFs. In addition, State enacted parallel provisions to PURPA that obligated regulated public utilities, such as X, to enter into long-term contracts to purchase electricity from, and granted additional rights to, entities such as Taxpayer that qualified under the State Act as co-generation facilities or small hydro production facilities.

The prices paid for electricity under these statutorily-mandated contracts were based upon projections of the costs that the regulated public utility otherwise would incur to meet its service requirements ("avoided costs"). These avoided costs were composed of (1) in all cases, variable costs associated with producing electricity, and (2) in some cases, fixed costs associated with developing and constructing a facility if the regulated public utility did not have the generation capacity to meet the demand for electricity.

In August, Year 1, X entered into a PPA with Taxpayer that was priced to reflect both the fixed and variable costs of producing electricity required to be purchased under the agreement. For the output of Taxpayer's facility, X was obligated, beginning in Year 3, to pay r¢ per kilowatt hour; thereafter the rate escalates annually for the next s years by t percent per year. For years u, the rate for electricity is calculated based on a formula that offsets the continuing t percent annual escalator by netting out what otherwise would have been escalating rent payments under the ground lease. Taxpayer projected that the payments to be made to it under the PPA would cover both the fixed costs associated with the development, construction, maintenance, and operation of the facility.

The PPA has a term of 40 years, from the first year the facility was placed in service. The PPA can be assigned to a third party by Taxpayer without X's consent, Taxpayer was merely obliged under the PPA to provide prior written notification to X of such an assignment.

At the time that the PPA was executed, the price X was to pay for electricity was agreed to by Taxpayer and X and was believed to be a fair price based on X's projections of the costs it would otherwise have incurred over the term of the PPA. However, by mid-Year 4, X had projected that it had excess electric production capability and thus its new avoided costs rates (and accordingly the prices it was required to pay new projects for electricity) were substantially less than its Year 1 rates. Thus, the price paid by X pursuant to Taxpayer's PPA has for some time exceeded the State Public Service Commission's ("PSC") current approved rates.

Initially, X was able to recover its costs for electricity produced by, and purchased from, Taxpayer and other IPPs under its State PSC-approved tariffs, which included a fuel adjustment clause. However, X's electricity rates are much higher than in other areas of the United States. Due to the disparity between actual market electricity prices and the price paid for electricity under Taxpayer's PPA and other PPAs, the State PSC and consumers pressured X to reduce its rates and move toward a competitive market. As early as March, Year 5, the State PSC began to investigate methods to create competitive opportunities for State electricity consumers, including X's customers, and requested that the utilities do the same. Pursuant to the State PSC's request, X commenced negotiations with Taxpayer and other IPPs to reduce its cost for electricity purchased under those PPAs. As of April, Year 6, X had renegotiated PPA agreements with 20 of 175 IPPs that had PPAs.

In an attempt to reduce its costs, X sought to have rules adopted by the State PSC which would permit X to curtail purchases of electricity from the IPPs. In April, Year 6, X petitioned the State PSC, suggesting that such rules were necessary and stating that the currently available settlement opportunities with the IPPs had been exhausted. Although the State PSC did not adopt a formal curtailment plan in Year 6, it continued its efforts to encourage regulated public utilities, including X, to develop a competitive electric market for State.

In response, in October, Year 7, X submitted a proposal entitled "Proposal" to the State PSC for reducing its electric rates to its customers. Stating that the differences with the IPPs had not been resolved, the Proposal set forth several alternative ways to restructure the PPAs, including the taking by eminent domain of the IPPs' electricity generating facilities and the curtailment of X's obligations to purchase electricity generated by the IPPs, emphasizing that it was essential to the creation of a competitive market that PPAs with a significant number of the unregulated IPPs be restructured such that those generating units become independent suppliers competing in the wholesale spot market or become suppliers to customers directly.

In the Proposal, X stated that if negotiations with the IPPs failed to produce the necessary cost savings, it proposed to utilize its power of eminent domain to acquire the generating units owned by the IPPs with which it has PPAs and subsequently resell them at auction in order to increase competition in the wholesale power market. It also stated that it would soon initiate the process necessary to exercise its power of eminent domain by filing a petition with the State PSC.[1]

[1] The power of eminent domain was delegated to X pursuant to State Statute which provides that "[a]n electric corporation shall have the power and authority to acquire such real estate as may be necessary for its corporate purposes ... in the manner prescribed by the Eminent Domain Procedure Law."

Taxpayer believed that X would institute an eminent domain proceeding against the facility unless X was otherwise able to reduce its payments to a significant number of IPPs with which it had PPAs. After the Proposal was made public, X and certain of the IPPs entered into negotiations. X took no further action towards exercising its eminent domain powers because of progress with the negotiations with the IPPs. During these negotiations, X's counsel stated to one of the IPPs that if the negotiations were not successful, X would have no way to restructure its markets and reduce its costs other than by commencing eminent domain proceedings.

In May, Year 8, the State PSC issued an order describing its goals and strategies for restructuring State's electric utility industry and stated that all possible efforts to reduce electric rates should be continued, including efforts to reduce utility commitments under IPPs contracts that include obligations for payments well above current wholesale prices. It further stated that if the parties were unwilling to restructure these contracts voluntarily, it would pursue policies to mitigate the impact of such contracts on rates. Subsequently, in July, Year 8, the State PSC stated publicly that the PPAs with the IPPs were a major hurdle to lowering electric rates in State and achieving a competitive electric market. Two weeks after this public statement, X made an offer to 44 IPPs to buy out their PPAs. Those IPPs retained an investment banking firm to evaluate X's offer.

Active negotiations between X and the IPPs continued until December, Year 8, when the negotiations stalled. In December, Year 8, the administrative law judge considering X's request for curtailment of purchases from the IPPs recommended that State utilities be allowed to curtail purchases. Although Taxpayer's PPA prohibits X's curtailment of purchases, Taxpayer was still concerned that some action by X or government authorities could result in curtailment of electricity purchases to some degree. In March, Year 9, Taxpayer and other IPPs made a counterproposal to the X's offer, which became the basis for further negotiations. In May, Year 9, the State PSC approved, but did not issue, a curtailment order, which allowed X to reduce the quantity of electricity that it was required to purchase from certain IPPs. The IPPs believed that the approval of the curtailment order was intended to place additional pressure on the negotiations with X.

In June, Year 9, X withdrew its offer to settle with Taxpayer under the specific terms of Agreement 1 being negotiated with the IPPs, but agreed to continue to negotiate the terms of a PPA restructuring with Taxpayer and eventually reached an initial agreement. In July, Year 9, other IPPs, but not the Taxpayer, signed Agreement 1, which was subsequently amended. In June, Year 10, the transaction was consummated in accordance with the terms of the amended Agreement 1. Pursuant to the amended Agreement 1, consideration in the aggregate of $ m cash and n shares of X common stock would be available for IPPs to elect from.

Although Taxpayer was not a signatory to Agreement 1, its initial agreement with X was conditioned on the consummation of Agreement 1. Accordingly if Agreement 1 was not consummated, Taxpayer's initial agreement to amend its PPA would not take effect. Because of the explicit contractual link between the initial agreement between Taxpayer and X and Agreement 1, X's statements concerning the consequences of failing to consummate the transactions contemplated by Agreement 1 directly impacted Taxpayer's restructuring agreement and its potential exposure to threats of condemnation and curtailment by X and State PSC. As such, Taxpayer remained apprised of X's proceedings with regard to the other IPPs.

In October, Year 10, X and Taxpayer signed Agreement 2. Pursuant to Agreement 2, Taxpayer terminated its PPA and lease and sold the facility to X in exchange for cash consideration.

Taxpayer represents that X had threatened, during negotiations, to pursue eminent domain actions against the IPPs' facilities, including Taxpayer's facility, if the restructuring negotiations were not successful. In November, Year 9, X informed the State PSC that it had not pursued the exercise of its power of eminent domain due to the progress in negotiations with the IPPs, but that it would take necessary measures, including exercise of its power of eminent domain, if the restructuring pursuant to Agreement 1 was not effected. Based on X's actions, Taxpayer states that it had a reasonable belief that a threat or imminence of condemnation existed against its facility.

Taxpayer further represents that if X had condemned its facility, the PPA would have been unenforceable and wholly worthless, and that it could not have sold electricity to X pursuant to the terms of the PPA. Taxpayer represents that the PPA was "site-specific" because that the PPA is limited to the purchase and sale of electricity produced and delivered by the facility referenced in the PPA. Thus, if Taxpayer's facility were taken by X pursuant to its eminent domain powers, Taxpayer could not sell electricity to X pursuant to the terms of the PPA, nor could it assign its PPA to a third party for value because the third party could not sell electricity to X pursuant to the terms of the PPA.

Taxpayer further represents that one of the requirements for QF status is that the facility must be owned by a person not primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities). Thus, once X (an electric utility) acquired the facility, the facility would lose its QF status, which is required by the PPA to be maintained. If the QF status is not maintained, X has the option of terminating the PPA, and it would have terminated the PPA. It is also represented that if X had acquired Taxpayer's facility, it would have auctioned the facility and the new owner of the facility could not have sold power to X pursuant to the PPA, but would have to abide by new pricing protocols in the competitive market.

Taxpayer has not treated the PPA as a separate and distinct asset on its books and records. Costs associated with acquiring the PPA, such as attorney's fees and other related costs, have been capitalized into a general asset category and amortized accordingly.

Taxpayer entered into a payment in lieu of tax agreement (PILOT Agreement) dated April, Year 2, with A and local taxing jurisdictions, expiring on December, Year 12. As a result of the restructuring, Taxpayer terminated the PILOT Agreement and made a cash termination payment to A, which will make pro rata termination payments to the local taxing jurisdictions. A required Taxpayer to make a cash termination payment to terminate the PILOT Agreement to ensure that the amount of tax revenue the local taxing jurisdictions receive with respect to the facility after the sale of the facility pursuant to Agreement 2 will be equal to the amount of tax revenue the local taxing jurisdictions would have received pursuant to the remaining term of the PILOT Agreement. Taxpayer does not intend to enter into a new PILOT agreement with A or another party.

Taxpayer's facility is operated by B pursuant to an operation and maintenance agreement, dated January, Year 5 and expiring (as amended) in February, Year 11 (the Operation and Maintenance Agreement). As a result of the restructuring, Taxpayer terminated the Operation and Maintenance Agreement and made a cash termination payment to B. Taxpayer does not intend to enter into a new operation and maintenance agreement with B or another party.

Taxpayer entered into financing agreements dated April, Year 5, with Lender (the Financing Agreements) relating to the construction and operation of the facility. The Financing Agreements provide for prepayment penalties. Taxpayer paid the prepayment penalty and make-whole payments to Lender in connection with the early termination of the Financing Agreements. Taxpayer will not enter into a new financing agreement with Lender or another lender with respect to the facility.

LAW AND ANALYSIS

(1) Whether the termination of Taxpayer's PPA pursuant to Agreement 2 constitutes a "compulsory or involuntary conversion" of its PPA and its facility within the meaning of §§ 1033 and 1231.

Section 1033(a)(2) provides in part that if property (as a result of its destruction in whole or in part, theft, seizure, or requisition or condemnation or threat or imminence thereof) is compulsorily or involuntarily converted into money, the gain (if any) shall be recognized except to the extent hereinafter provided in this paragraph.

Section 1033(a)(2)(A) provides that if a taxpayer during the period specified in § 1033(a)(2)(B), for the purpose of replacing the property so converted, purchases other property similar or related in service or use to the property so converted, then at the taxpayer's election, the gain shall be recognized only to the extent that the amount realized upon such conversion (regardless of whether such amount is received in one or more taxable years) exceeds the cost of such other property.

Section 1.1033-1(a) of the Income Tax Regulations provides in part that an involuntary conversion may be the result of the destruction of property, in whole or in part, the theft of property, the seizure of property, the requisition or condemnation of property, or the threat or imminence of requisition or condemnation of property.

Rev. Rul. 63-221, 1963-2 C.B. 332, establishes the criteria necessary for the existence of a threat or imminence of condemnation based on the taxpayer's reasonable belief. Generally, the threat or imminence of condemnation exists when a property owner is informed, either orally or in writing, by a representative of a governmental body or public official authorized to acquire property for public use, that such body or official has decided to acquire the owner's property, and the owner has reasonable grounds to believe, from the information conveyed to him by such representative, that the necessary steps to condemn the property will be instituted if a voluntary sale is not arranged.

Rev. Rul. 74-8, 1974-1 C.B. 200, modifying Rev. Rul. 63-221, provides that a threat or imminence of condemnation may exist where the purchaser, a public utility, lacked actual condemnation authority prior to or at the time of the sale, but it generally could readily obtain the power to condemn by application to the appropriate state official authority in the event that a voluntary sale was not arranged, and there was no reason to believe that such power to condemn the land purchased would be denied.

Rev. Rul. 59-361, 1959-2 C.B. 183, recognized the economic unit theory of Masser v. Commissioner, 30 T.C. 741 (1958), acq. 1959-2 C.B. 5. The taxpayer in Masser owned a freight terminal and the parking lots across the street from the terminal that were necessary for its operation. The parking lots were condemned and the taxpayer being unable to secure adequate replacement lots in the same vicinity sold the freight terminal. The proceeds of the sale of the freight terminal, together with the proceeds from the condemnation of the parking lots, were reinvested in a similar terminal and parking facilities suitable for the taxpayer's business. The court allowed involuntary conversion treatment for the terminal proceeds and the parking lot proceeds on the theory that the two properties were used as an economic unit. Accordingly, the Service stated that where all the facts and circumstances show a substantial economic relationship between the condemned property and the other property sold by the taxpayer, so that together they constituted one economic property unit, such as existed in the Masser case, involuntary conversion treatment for the proceeds of the voluntary sale will be permitted.

Rev. Rul. 82-147, 1982-2 C.B. 190, held that the sale of the taxpayer's fishing resort due to an act of Congress declaring the area in which it is located a Boundary Waters Canoe Area Wilderness constituted an involuntary conversion. The act prohibited the use of motorboats with motors of greater than 25 horsepower on the lake. The restriction on horsepower of motorboats effectively denied the taxpayer the former economic use of its resort. The act gave an affected resort owner the option to require the government to purchase the resort at its fair market value without regard to the restriction. The restriction together with the provision authorizing purchase effectively constituted a taking of the property upon payment of fair compensation.

The actions of the State PSC and X with regard to the establishment of a competitive electricity market for State provide notice to Taxpayer as well as a reasonable basis for Taxpayer to conclude that X would pursue its threat to condemn Taxpayer's facility if Taxpayer did not renegotiate its PPA. Further, it is clear that X had the authority under State Statute to commence eminent domain proceedings against Taxpayer's facility.

Taxpayer's representations regarding the relationship between its PPA and its facility establish that the property converted (the PPA) bears a "substantial economic relationship" to the threatened property (the facility) against which X has taken actions that constitute a threat or imminence of condemnation. Further, if X were to condemn the facility, this action would damage completely the value of the PPA to Taxpayer. Thus, although X's threat of condemnation was made to Taxpayer's facility, because the facility and the PPA form an economic unit, the termination of Taxpayer's PPA pursuant to the Agreement 2 constitutes an involuntary conversion made under a threat or imminence of condemnation by X of the PPA and the facility.

(2) Whether the amount of any gain (or loss) required to be recognized by Taxpayer in connection with the conversion of its PPA and its facility is a § 1231 gain or § 1231 loss.

Section 1231(a) prescribes in part the treatment of certain gains from involuntary conversions. Section 1231(a)(3)(A)(ii) provides that the term § 1231 gain means any recognized gain from the compulsory or involuntary conversion (as a result of destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof) into other property or money of (1) property used in a trade or business, or (2) any capital asset which is held for more than 1 year and is held in connection with a trade or business or a transaction entered into for profit. See also § 1231(a)(3)(B) (losses). Under § 1231(a), if § 1231 gains for the year exceed § 1231 losses, they are treated as long-term capital gains and losses; if § 1231 losses exceed § 1231 gains, they are treated as ordinary gains and losses.

The provisions in § 1231 that deal with involuntary conversions provide a statutory sale or exchange for such transactions, so that they may qualify for potential capital gain treatment, depending on the netting of gains and losses under § 1231. These provisions were added by Congress in part to supplement what is now § 1033, and are generally interpreted in a similar manner. See H. Rep. No. 2333, 77th Cong., 2d Sess., 1942-2 C.B. 372, 415; Conf. Rep. No. 2586, 77th Cong., 2d Sess. 1942-2 C.B. 701, 708-9. Cf. Rev. Rul. 271, 1953-2 C.B. 36 (treatment of severance damages under § 1231). Accordingly, any gain (or loss) recognized by Taxpayer in connection with the conversion of its PPA and its facility will be treated as a "§ 1231 gain" or "§ 1231 loss."

35

(3) Whether Taxpayer may deduct under § 162 the amount paid to terminate the Operation and Maintenance Agreement.

Section 162 provides, in part, that taxpayers may deduct all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business. Further, § 1.162-1(a) provides, in part, that deductible business expenses include the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business.

Sections 263(a)(1) and (a)(2) provide that taxpayers may not deduct amounts paid for new buildings or for permanent improvements or betterments made to increase the value of any property or estate or any amount expended in restoring property or making good the exhaustion thereof for which an allowance is or has been made.

In certain instances, the courts have allowed taxpayers to currently deduct amounts paid by taxpayers to terminate burdensome and uneconomic contracts. See, e.g., Capitol Indemnity Ins. Co. v. Commissioner, 237 F.2d 901, 903 (7th Cir. 1956) (amounts incurred by taxpayer to free itself from an unprofitable agency contract were deductible); Montana Power Co. v. U.S., 171 F. Supp. 943 (Ct. Cl. 1959) (cash paid and the fair market value of stock surrendered to relieve the taxpayer of its obligation under supply contract was deductible business expense); Stuart Co. v. Commissioner, T.C. Memo ¶50,171, aff'd, 195 F.2d 176 (9th Cir. 1952) (an amount allocable to the cancellation of an onerous supply contract was deductible as an ordinary and necessary business expense); Olympia Harbor Lumber Co. v. Commissioner, 30 B.T.A. 114 (1934), aff'd, 79 F.2d 394 (9th Cir. 1935) (amount paid to terminate an unsatisfactory waste disposal contract was a currently deductible business expense).

In addition, both the courts and the Internal Revenue Service have maintained that amounts paid solely to reduce or eliminate future costs are also deductible. See, e.g., T.J. Enterprises, Inc. v. Commissioner, 101 T.C. 581, 589 (1993) (amounts paid to majority shareholder to compensate her for refraining from causing a royalty rate increase were currently deductible); Rev. Rul. 95-32, 1995-1 C.B. 8 (expenditures incurred by a public utility for the implementation and operation of energy load management programs are currently deductible under § 162); Rev. Rul. 94-77, 1994-2 C.B. 19 (Supreme Court's decision in INDOPCO, Inc. v. Commissioner, 503 U.S. 79 (1992), does not affect the treatment of severance payments, made by a taxpayer to its employees, as business expenses that are generally deductible).

Taxpayer paid the termination payment to terminate Operation and Maintenance Agreement with respect to operation of its facility, and therefore reduce its future costs. Accordingly, the amount paid by Taxpayer to terminate the Operation and Maintenance Agreement is a deductible expense under § 162.

(4) Whether Taxpayer may deduct under § 164 the amount paid to terminate the PILOT Agreement.

Section 164(a)(1) provides that state and local real property taxes are deductible in the year paid or accrued. The term "real property taxes" means taxes imposed on real property and levied for the general public welfare. Treas. Reg. § 1.164-3(b).

Payments in lieu of taxes (such as those provided for in the PILOT Agreement) are deductible as real property taxes where such payments are made to a public benefit corporation (such as A) provided the payments are charges imposed on the taxpayer in order to obtain revenue for a public purpose the taxing authority would otherwise lose because the property owner is tax exempt. Rev. Rul. 71-49, 1971-1 C.B. 103 (tax equivalency payments made to New York City Educational Construction Fund, a public benefit corporation, deductible under § 164). In addition, courts have held that a prepayment of real estate taxes is deductible under § 164(a)(1). See Consolidated Edison Company of New York, Inc. v. United States, 10 F.3d 68 (2d Cir. 1993) (prepayment of real estate taxes as well as discount for prepayment deductible under § 164(a)(1) in the year paid).

A is a public benefit corporation under the laws of State. Under Taxpayer's PILOT Agreement, Taxpayer makes PILOT payments to A at a rate or in an amount set forth in the PILOT Agreement. Thus, to the extent a payment made by Taxpayer to terminate the PILOT Agreement is considered a payment or prepayment of taxes payable thereunder, the payments made to terminate the PILOT Agreement are deductible under § 164(a)(1).

Under Taxpayer's PILOT Agreement, Taxpayer makes PILOT payments to A for distribution to the local taxing jurisdictions at the rates or in the amounts set forth in the PILOT Agreement. The PILOT payments made under the PILOT Agreement are not made in exchange for local benefits, but are made for the general public welfare. See Rev. Rul. 61-152, 1961-2 C.B. 42 ("service charges" constituted taxes within the meaning of § 164); Rev. Rul. 71-49 (whether a particular charge falls into the category of a tax depends upon its real nature). Therefore, the payments made by Taxpayer pursuant to the PILOT Agreement are tax equivalency payments and are deductible as taxes under § 164(a)(1).

Accordingly, a payment made by Taxpayer to terminate the PILOT Agreement is a payment or prepayment of taxes, and the termination payment is deductible under § 164(a)(1).

(5) In which taxable year may Taxpayer deduct the termination payments for the PILOT Agreement and Operation and Maintenance Agreement.

Section 461(a) provides generally that the amount of any deduction shall be taken for the taxable year which is the proper year under the method of accounting used in computing taxable income.

Section 461(h) provides that in determining whether an amount has been incurred with respect to any item during any taxable year, the all events test shall not be treated as met any earlier than when economic performance with respect to such item occurs.

Section 461(h)(2)(D) provides generally that in the case of liabilities other than those described in §§ 461(h)(2)(A), (B), and (C) economic performance occurs at the time determined under the regulations prescribed by the Secretary.

Section 1.461-1(a)(2) provides generally that under the accrual method of accounting, a liability is incurred and generally taken into account for federal income tax purposes, in the taxable year in which all the events have occurred that establish the fact of the liability, the amount of the liability can be determined with reasonable accuracy, and economic performance has occurred with respect to the liability.

Section 1.461-4(g)(1)(i) provides that in the case of liabilities described in paragraphs (g)(2) through (7) of this section, economic performance occurs when, and to the extent that, payment is made to the person to which the liability is owed.

Section 1.461-4(g)(1)(ii)(B) provides that payment to a particular person is accomplished if § 1.461-4(g)(1)(ii)(A) is satisfied and a cash basis taxpayer in the position of that person would be treated as having actually or constructively received the amount of the payment as gross income under the principles of § 451.

Section 1.461-4(g)(2) through (g)(6) set out specific liabilities for which payment is economic performance. In general, these liabilities include those arising under a workers compensation act or out of any tort, breach of contract, or violation of law, liabilities to pay rebates or refunds, liabilities to provide awards, prizes, or jackpots, liabilities arising out of the provision to the taxpayer of insurance, warranty or service contracts, and liabilities of a taxpayer to pay taxes.

Section 1.461-4(g)(6)(i) provides that if the liability of a taxpayer is to pay a tax, economic performance occurs as the tax is paid to the governmental authority that imposed the tax. However, under § 1.461-4(g)(6)(iii), if a taxpayer has made a valid election under § 461(c), the taxpayer's accrual for real property taxes is determined under § 461(c). Otherwise, economic performance with respect to a property tax liability occurs as the tax is paid as specified in § 1.461-4(g)(6)(i).

Section 1.461-4(g)(7) provides that in the case of a taxpayer's liability for which economic performance rules are not provided elsewhere in this section or in any other regulation, revenue ruling or revenue procedure, economic performance occurs as the taxpayer makes payment in satisfaction of the liability to the person to whom the liability is owed.

On the date that the PILOT Agreement and Operation and Maintenance Agreement were terminated, Taxpayer's liability became fixed and the amount of each liability could be determined with reasonable accuracy under §1.461-1(a)(2). Under § 1.461-4(g)(6)(i), Taxpayer's liability to compensate A with respect to the PILOT Agreement constitutes a liability for which economic performance occurs, and consequently Taxpayer is entitled to a deduction, in the year the termination payment is made. Taxpayer's liability to compensate B with respect to the Operation and Maintenance Agreement constitutes a liability for which economic performance rules are not provided elsewhere in § 1.461-4 or in any other regulation, revenue ruling, or revenue procedure. Thus, pursuant to § 1.461-4(g)(7), economic performance occurred when Taxpayer made the termination payment to the other party to the Operation and Maintenance Agreement.

Based on the foregoing analysis, Taxpayer may deduct termination payments for the PILOT Agreement and Operation and Maintenance Agreement in the taxable year in which the termination payment was paid with respect to each agreement.

(6) Whether Taxpayer may deduct under § 163 in the year of payment the amounts paid as penalties for prepayment of the Lender Financing Agreements.

Section 163(a) allows a deduction for all interest paid or accrued within the taxable year on indebtedness. For these purposes, the term "interest" is defined as amounts paid for the use or forbearance of money. Deputy v. DuPont, 308 U.S. 488, 498 (1940); Old Colony R.R. v. Commissioner, 284 U.S. 552 (1932).

Generally for a debtor, prepayment charges are deductible as interest because they are considered an additional amount paid for the use of money. Rev. Rul. 86-42, 1986-1 C.B. 82. This rule applies even to a payment that might otherwise be characterized as a repurchase premium. § 1.163-7(c); but see § 1271(a)(1) and Prudential Ins. Co. of America v. Commissioner, 882 F.2d 832 (3rd Cir. 1989) (amounts received by a creditor to retire debt are amounts received in exchange for the debt.)

In determining whether a payment represents interest or another form of compensation, the courts will consider the purpose of the charge as well as whether the charge has the "characteristics of interest," for example, whether the charge is related to the amount borrowed. Lay v. Commissioner, 69 T.C. 421, 438 (1977). Additionally, amounts paid for specific services, rather than the use or forbearance of money, are not deductible as interest. Reinhardt v. Commissioner, 75 T.C. 47, 51 (1980).

In this transaction, just as in Rev. Rul. 86-42, the prepayment penalties are additional fees for the cost of the use of money. In each case, the penalty is directly related to the amount borrowed under the financing agreement. The payment is not for any specific services, other than for the loan. For this reason, the prepayment penalties are deductible as interest to Taxpayer.

On the date that the Lender Financing Agreements were terminated, Taxpayer's liability for the prepayment penalties became fixed and the amount of each penalty could be determined with reasonable accuracy under §1.461-1(a)(2).

Section 1.461-4(e) provides that in the case of interest, economic performance occurs as the interest cost economically accrues, in accordance with the relevant provisions of the Code. Although the prepayment penalties are deductible as interest under § 163, since the imposition of the prepayment penalties is not related to the passage of time, these costs do not economically accrue in the manner described in 1.461-4(e). Therefore, under § 1.461-4(g)(7), economic performance occurred in the taxable year in which the prepayment penalty was paid with respect to each Lender Financing Agreement. Accordingly, Taxpayer may deduct the prepayment penalties under § 163 in the taxable year in which the penalties were paid.

* * * * *

Based on Taxpayer's representations and the above analysis, we rule as follows:

(1) The termination of the PPA pursuant to the Agreement 2 constitutes a "compulsory or involuntary conversion" of the PPA and the facility within the meaning of §§ 1033 and 1231.

(2) The amount of any gain (or loss) required to be recognized by Taxpayer in connection with the conversion of its PPA and its facility will be treated as a "§ 1231 gain" or "§ 1231 loss" in accordance with the provisions of § 1231.

(3) The amount paid by Taxpayer to terminate the Operation and Maintenance Agreement is deductible under § 162.

(4) The amount paid by Taxpayer to terminate the PILOT Agreement is deductible under § 164(a)(1).

(5) Taxpayer's payments to terminate the PILOT Agreement and Operation and Maintenance Agreement are deductible in the taxable year in which the payments were paid.

(6) Taxpayer may deduct under § 163 in the year of payment the amounts paid as penalties for prepayment of the Lender Financing Agreements.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter.

This ruling is directed only to the taxpayer(s) requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent. A copy of this letter must be attached to any income tax return to which it is relevant.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representatives.

Sincerely,

Assistant Chief Counsel
(Income Tax & Accounting)

By: Kelly Alton

Kelly E. Alton
Senior Technician Reviewer
Branch 5

cc: